Supreme Court, U.S.
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No. 99-1112

IN THE

Supreme Court of the United States

THOMAS MILLER, Attorney General of the State of Iowa, in his official capacity,

Petitioner,

v.

PLANNED PARENTHOOD OF GREATER IOWA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Iowa "partial-birth" abortion statute is unconstitutional under this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *Thornburgh v. ACOG*, 476 U.S. 747 (1986), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), because it bans a broad range of abortion procedures, including the safest methods of second-trimester abortion available in Iowa, without regard to fetal viability and without any exception for the woman's health?

2. Whether the court of appeals properly declined to narrow the scope of the Iowa partial-birth abortion statute because doing so would have required the court to rewrite the law and because such a narrowing construction would not cure its constitutional deficiencies?

LIST OF PARTIES

All of the parties to this proceeding are listed on the caption to the Petition for Writ of Certiorari, except for respondent Rebecca Shaw, M.D.

Planned Parenthood of Greater Iowa, Inc. is the only respondent represented by undersigned counsel that is a corporation, and it has neither a parent corporation, nor nonwholly owned subsidiaries.

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Plaintiffs-respondents, Planned Parenthood of Greater Iowa, Sue Haskell, D.O., Paula Mahone, M.D., and Rebecca Shaw, M.D., respectfully submit the following response to the petition for writ of certiorari filed by the Attorney General of Iowa.[1]

REASONS TO DENY THE WRIT, OR IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE

This case is one of three decided on September 24, 1999 by the U.S. Court of Appeals for the Eighth Circuit, ruling that Arkansas, Iowa and Nebraska laws banning so-called "partial-birth" abortion are unconstitutional. *See Little Rock Family Planning Services v. Jegley*, 192 F.3d 794 (8th Cir. 1999); *Planned Parenthood v. Miller,* 195 F.3d 386 (8th Cir. 1999); and *Carhart v. Stenberg,* 192 F.3d 1142 (8th Cir. 1999), *cert. pet. docketed,* No. 99-830 (S. Ct. Nov. 15, 1999). The Attorney General of Nebraska has also petitioned for a writ of certiorari to review the *Carhart* decision, and an opposition has been filed urging this Court either to deny the writ, or if review is granted, to take the case to consider the questions presented by the respondents, not the petitioner,[2]

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[1] Plaintiffs-respondents in *Niebyl v. Miller*, the case consolidated with this one by the district court, are separately represented and will submit a separate response to the Iowa Attorney General's petition.

[2] The questions identified by respondents in *Carhart* are:

1. Whether the Nebraska partial-birth abortion statute is unconstitutional under this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *Thornburgh v. ACOG*, 476 U.S. 747 (1986), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), because it bans a broad range of abortion procedures, including the safest methods of second-

and to summarily affirm the lower court. Respondents here take the same position as the Nebraska respondents. However, they also urge that, if the Court grants Nebraska's petition, it should also grant Iowa's petition in this companion case because the record here further elucidates why laws banning "partial-birth" abortion must be found unconstitutional.[3]

I. THE LOWER COURT'S RULING SHOULD NOT BE DISTURBED

The court of appeals ruled that the Iowa law banning "partial-birth" abortion, in addition to banning the dilation and extraction ("D&X") procedure, "prohibits, by its plain language, other abortion procedures as well."[4] 195 F.3d at 387, Pet. App. 2. In particular, it found that the Iowa law "prohibit[s] the most commonly used method for second-

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trimester abortion available in Nebraska, without regard to fetal viability and without any exception for the woman's health?

2. Whether the court of appeals properly declined to narrow the scope of the Nebraska partial-birth abortion statute because doing so would have required the court to rewrite the law and because such a narrowing construction would not cure its constitutional deficiencies?

See Respondent's Brief in Opposition, *Carhart v. Stenberg*, No. 99-830, dated Dec. 14, 1999 (hereinafter "*Carhart* Respondent's Brief").

[3] Because the papers in *Carhart* are already before this Court, and the evidence and legal issues in the two cases overlap to a great extent, respondents here have attempted to avoid repetition and to use this brief only to discuss how the record in this case differs from, or augments, the record in *Carhart*.

[4] The definition of "partial-birth" abortion in the Iowa law is virtually identical to the definition in the Nebraska law.

trimester abortions, the dilation and evacuation procedure (D&E), as well as, in some circumstances, the suction-curettage procedure" for first-trimester abortions. 195 F.3d at 388, Pet. App. 3.[5] As a result of the law's scope, the court of appeals ruled that "an undue burden is created for women seeking pre-viability abortions." *Id.*[6]

For the reasons explained in the *Carhart* Respondent's Brief at 11-15, the court of appeals' ruling is fully in accord with this Court's jurisprudence. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Thornburgh v. ACOG*, 476 U.S. 747 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). It therefore should not be disturbed.

II. IF REVIEW OF THE *CARHART* DECISION IS GRANTED, THE COURT SHOULD TAKE THIS CASE TOO

If, however, this Court decides to review the Eighth Circuit's *Carhart* decision, it should review the Eighth

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[5] References to "Pet. App." are to the Appendix bound with the Petition. References to "Pet. Supp. App." are to the Supplemental Appendix to Petition for Writ of Certiorari, filed by petitioners.

[6] The district court struck down the Iowa statute on the grounds that it: is void for vagueness, imposes an "undue burden" on women seeking abortions in Iowa, fails to provide adequate exceptions to preserve a woman's health, unconstitutionally "limit[s] the life exception to a situation where the woman's life is *physically* endangered," and impermissibly fails to take into consideration a physician's "appropriate medical judgment" in determining whether an abortion is necessary to preserve a woman's life or health. *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157, 1165, 1167-8 (S.D. Iowa 1998), Pet. Supp. App. 17, 21-24. After finding that the Iowa law imposes an "undue burden," the circuit court did not reach the other grounds for the district court's ruling.

Circuit's decision in this case as well because the evidentiary record and factual findings in this case supplement the Nebraska record in three important respects. The record here provides detailed evidence: that the Iowa Legislature intended to ban more than the D&X procedure; that the Iowa law would ban abortions in the first-trimester of pregnancy using the suction curettage method (in addition to the second-trimester abortions that the Nebraska district court ruled would be banned); and that banning "partial-birth" abortion would harm women with high-risk pregnancies and their obstetricians and perinatologists.

A. The Legislative History of the Iowa Law Demonstrates an Unconstitutional "Purpose"

At every judicial level, including before this Court, the State of Iowa has asserted that the Iowa statute bans only the D&X method of abortion. The Iowa Attorney General's reading of the law as banning only D&X abortions is in conflict not only with the statute's plain language, but with its legislative history. That history demonstrates that the sweeping breadth of the law, and its disregard of women whose health is endangered by continued pregnancy, was intentional.

Both the Iowa House of Representatives and Senate considered and rejected several amendments that would have narrowed the law's application and expanded its exceptions. Specifically, both chambers of the legislature considered and rejected amendments that would have: 1) restricted the definition of "fetus" to mean "a human fetus that has achieved viability;" 2) restricted the term "partial-birth abortion" to only the "intact dilation and extraction procedure;" 3) excluded from the definition of "partial-birth

abortion" all "vacuum aspiration, suction aspiration, dilation and curettage, suction curettage, induction, [and] dilation and evacuation procedures;" 4) included an exception to the ban for "partial-birth abortions" that are "necessary to preserve the life or health of the woman;" and 5) limited the Act's civil cause of action to only the woman upon whom the banned procedure was performed. *See* 30 F. Supp. 2d at 1163 (citing *State of Iowa Senate Journal*, Thurs. Feb. 5, 1998, at 214-15 (rejecting Amendments S-5021, S-5023, S-5024, S-5025); *State of Iowa House Journal*, Wed. Feb 18, 1998, at 280-88 (rejecting Amendments H-8061, H-8062, H-8065)), Pet. Supp. App. 11. In addition, the Senate also considered and rejected an amendment that would have expanded the Act's exception to include those "partial-birth abortions" necessary to preserve the future fertility of the woman. *See* 30 F. Supp. 2d at 1163 (citing *State of Iowa Senate Journal*, Thurs. Feb. 5, 1998, at 214-15 (rejecting Amendment S-5022)), Pet. Supp. App. 11.

On the basis of this legislative history, the district court found that "language that would have expressly limited the reach of Iowa's ban to the D&X procedure was specifically rejected by both chambers of the Iowa legislature." 30 F. Supp. 2d at 1166, Pet. Supp. App. 20. The rejection of proposed amendments that would have excluded suction curettage, induction, and D&E procedures -- the three most common previability abortion methods -- from the ban shows that the legislature's purpose was to ban far more than D&X abortions. The rejected amendments also demonstrate that the legislature wanted to ensure that the ban remained in force virtually regardless of its impact on the pregnant woman's health or future futility. Under the analytic framework established in *Casey*, a law that regulates abortion is unconstitutional if "its purpose or effect is to

place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 878. The legislative history shows that the "purpose" prong of the undue burden test is violated by the Iowa ban on "partial-birth" abortion.

Not only must the Iowa Attorney General's narrowing construction be rejected as contrary to the legislative intent, it also cannot stand because the State's definition of what constitutes a D&X abortion appears to change with each submission. The district court noted that "the language used to describe a 'partial-birth abortion' in Defendant's Interrogatory No. 1 is not the same language used to describe a 'partial-birth abortion' in the Act. Nor is it the same language used by Defendant to describe 'the procedure clearly prohibited by the Iowa statute' in the [State's response to plaintiffs' motion for summary judgment]." 30 F. Supp. 2d at 1163-64 & nn.5 & 7, Pet. Supp. App. 13-14. Given these conflicting definitions, confusion would ensue if the State's "narrowing" construction were adopted. Such confusion would abridge fundamental tenets of due process that require criminal laws to provide clear notice of what conduct is prohibited, and would chill the provision of constitutionally protected abortion services. [7] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (where laws fail to provide explicit standards they "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc

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[7] Moreover, adopting the State's construction would violate the rule that a federal court will not "rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). *See* discussion in *Carhart* Respondent's Brief, at 16-19.

and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

B. The District Court Found that Even First-Trimester Abortions Would be Banned

The district court found, and the circuit court affirmed, that suction curettage abortions -- the procedure used in almost all first trimester abortions [8] -- would be banned by the Iowa law.[9] This is because "in performing a . . . suction curettage, the physician may deliver a substantial portion of the fetus into the vagina before it is disarticulated, for the purpose of terminating the fetus [sic], and then do so."[10] 30 F. Supp. 2d at 1165, Pet. Supp. App. 18. *See also*

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[8] *See* 30 F. Supp. 2d at 1167, Pet. Supp. App. 22 (during first thirteen weeks of pregnancy, physicians "rely almost entirely" on suction curettage).

[9] The Nebraska district court did not decide if the Nebraska law reaches suction curettage abortions. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1130 n.44 (D. Neb. 1998).

[10] In first-trimester suction curettage procedures:

> the physician dilates the cervix, increasing the circumference of its opening. The physician then inserts a thin tube through the vagina, through the cervix, and into the uterus. By means of suction, the physician removes the embryo or fetus and the other products of conception. Sometimes a physician performing suction curettage must use forceps to remove the fetus or parts of the fetus. In addition, sometimes a physician must make multiple passes through the uterus with the suction cannula before it is empty. If the physician has only removed part of the fetus from the uterus, the part remaining in the uterus may have a heartbeat.

30 F. Supp. 2d at 1161, Pet. Supp. App. 6.

195 F.3d at 389, Pet. App. 5.[11] This evidence of the reach of bans on "partial-birth" abortion, not contained in the Nebraska record, further establishes why these laws are unconstitutional.[12]

C. The Iowa Record Contains Additional Evidence of the Harms Caused by the Lack of a Health Exception and the Inadequate Life Exception

The Iowa law, like the Nebraska law, contains no exception to the ban for when a woman's health is threatened by continued pregnancy and only an inadequate exception for women whose lives are at risk. *See* 30 F. Supp. 2d at 1168, Pet. Supp. App. 24 ("The language of the Act impermissibly narrows the standard set forth by the Supreme Court in *Casey* by making no exception for the preservation of *health*, by

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[11] Both lower courts also ruled that the Iowa law would ban D&E procedures, 30 F. Supp. 2d at 1167, Pet. Supp. App. 23, 195 F.3d at 389, Pet. App. 6, the procedure used in approximately 96% of post-first-trimester abortions. 30 F. Supp. 2d at 1161, Pet. Supp. App. 6. Because this factual finding was also made in the Nebraska case and is described in detail in the *Carhart* Respondent's Brief, at pages 3-5, respondents here do not repeat the discussion.

[12] Several other federal district courts have ruled that suction curettage abortions would be banned by "partial-birth" abortion statutes. *See Little Rock Family Planning Services v. Jegley*, No. LR-C-97-581, slip op. at 48 (E.D. Ark. Nov. 13, 1998), *aff'd on other grounds*, 192 F.3d 794 (8th Cir. 1999); *Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478, 493 (D.N.J. 1998), *appeal docketed*, No. 99-5042 (3rd Cir. argued Nov. 19, 1999); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 617 (E.D. La. 1999), *appeal docketed*, No. 99-30324 (5th Cir. Apr. 5, 1999); *Hope Clinic v. Ryan*, 995 F. Supp. 847, 857 (D. Ill.1998), *vacated and remanded*, 195 F.3d 857 (7th Cir. 1999), *stayed*, No. 99-A427 (Stevens, J., Circuit Justice Nov. 30, 1999), *cert. pet. docketed*, No. 99-1152 (S. Ct. Jan. 10, 2000).

limiting the life exception to a situation where the woman's life is *physically* endangered, and by omitting the `necessary, in appropriate medical judgment' language from the standard for life and health exceptions.") (emphasis in original).

Two of the plaintiff-respondent physicians in this case routinely treat women with high-risk pregnancies. Plaintiff-respondent Paula Mahone, M.D., is an obstetrician-gynecologist and a perinatologist in Des Moines who performs abortions. The majority of her pregnant patients have medical conditions that can complicate the pregnancy or are at high risk for having a fetus with a severe anomaly. Plaintiff-respondent Rebecca Shaw, M.D. is an obstetrician-gynecologist in Des Moines who also sees many women with high-risk pregnancies and who performs abortions for some of them. The declarations of Drs. Mahone and Shaw that are part of the record in this case demonstrate the serious hardships that would result for pregnant women and their physicians if the law were in effect, especially given the absence of a health exception and the inadequacies of the "life" exception.

CONCLUSION

Because the record and the district court's factual findings illuminate the true purpose underlying bans on "partial-birth" abortion, the scope of the laws, and the harms they cause, petitioners urge that if the Court grants the writ in the companion case of *Carhart v. Stenberg*, it should grant Iowa's writ too, and summarily affirm the decision below.

Respectfully submitted,

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